

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JEFFREY TOLL,

Plaintiff,

v.

NEVADA PROPERTY 1, LLC d/b/a THE
COSMOPOLITAN OF LAS VEGAS,

Defendant.

Case No. 2:20-cv-00929-KJD-DJA

**ORDER GRANTING IN PART
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court are competing motions for summary judgment. Plaintiff filed his Motion for Partial Summary Judgment on April 29, 2021. (ECF #15). Defendant responded in opposition (ECF #17) and Plaintiff replied (ECF #20). Defendant filed its Motion for Summary Judgment on April 30, 2021. (ECF #16). Plaintiff responded in opposition (ECF #18) and Defendant replied (ECF #21).

I. Factual and Procedural Background

Plaintiff Jeffery Toll's ("Toll") action stems from an incident that took place at Defendant Nevada Property 1, LLC d/b/a The Cosmopolitan of Las Vegas' ("The Cosmopolitan") property. (ECF #16, at 3). The Cosmopolitan was hosting a special event and sent Toll promotional mail advertising the Million Point Club III promotion ("the Promotion"). (ECF #15, at 3). If a person could accumulate one million player points at the Cosmopolitan between January 1, 2019 and June 6, 2019, he would qualify for participation in a series of highly exclusive slot machine tournaments and ticket drawings. Id. Toll is a professional gambler and estimated that he could profit from earning one million points and participating in the Promotion. Id. Toll gambled at The Cosmopolitan in January, March, April, May, and June of 2019, accruing losses totaling \$238,717.25. Id. Toll claims that he would not have gambled so

1 much at The Cosmopolitan without the possibility of participating in the Promotion. Id.

2 The incident details are found on an incident report created by Security Manager Blake
3 Day (“Day”). (ECF #15-10). According to the report, Toll had three rooms reserved under his
4 name at The Cosmopolitan on June 3, 2019. Id. at 2. Day received a call from AML Compliance
5 Manager Melissa Ginsburg (“Ginsburg”) regarding an email about Toll and that Toll was to be
6 “evicted and trespassed from the property for Anti-Money Laundering (AML) concerns.” Id. at
7 1. The Cosmopolitan does not include facts regarding why Ginsburg initially made the decision
8 to evict Toll. Instead, The Cosmopolitan focuses on the evidence of a potential crime found after
9 Toll was notified of his eviction. Toll cites a statement given by Tonya Witthauer (“Witthauer”) who was Toll’s casino host. (ECF #15-9).¹ According to Witthauer, Toll admitted to her that he
10 had “visit[ed] other casinos (disguised wearing a hat) that he had been previously trespassed
11 from and playing under other peoples [sic] cards or fictitious names.” Id. at 1. Toll also told
12 Witthauer that he owed the Hard Rock Casino in Florida for unpaid markers but was interested in
13 a credit line from The Cosmopolitan. Id. Witthauer decided to “google” Toll after his fluctuation
14 in gaming activity and statements regarding his need to use an alias when checking into the hotel
15 raised red flags. Id. She found the website <https://jeffreywarrentoll.com> and reported the
16 information to her superior Kevin Sweet. Id. The website states that Toll is “a convicted felon,
17 fraudster, con artist and scammer with a gambling problem.” (ECF #17-2, at 14). Toll alleges
18 that this is what led to the decision to have him trespassed and eventually held in the security
19 room. (ECF #15, at 5).

20
21 Because Toll had three rooms registered in his name, each was to be hard pinned² to
22 force Toll to contact the front desk. (ECF #15-10, at 2. Day and security officer Kendall Vicenti
23 (“Vicenti”) approached the door of Toll’s first room while other team members called the room.
24 Id. Neither received a response so Day and Vicenti entered the room. Id. The Cosmopolitan’s
25 expert testified in his report that “to lock out a guest, security is required to confirm no one is in

26
27 ¹ Toll erroneously labeled this exhibit “Statement of Blake Day;” however, the report lists Witthauer as the person giving the statement and Day as the person witnessing/accepting the statement.

28 ² “Hard pinning (lockout) is a term of art and is the mechanical application for mortice locks in a hotel to prevent an occupant from entering the room by rendering the lock inoperable temporarily.” (ECF #17-2, at 7).

1 the room.” (ECF #17-2, at 7). Day and Vicenti saw several dozen Player Cards from various
2 casinos on the bed, some with Toll’s name, others with Toll’s name misspelled, and others with
3 names not associated with Toll. (ECF #15-10, at 2). They also saw a white Visa Debit Card in
4 the name of Stephanie Kirschbaum in a brown bag on the floor. Id. Day and Vicenti placed the
5 hard pin on the door and left for Toll’s next room. Id.

6 In Toll’s second room, Day and Vicenti followed the same procedure to ensure no one
7 was in the room. Id. When there was no response to their knocking or the phone call, they
8 entered the room. Id. They noticed a bag containing a “leafy green substance . . . which appeared
9 to be marijuana,” placed the hard pin, and left. Id. At the third room, Day and Vicenti made
10 contact with Marina Stepanova, who advised that the room was registered to a Vladimir
11 Revniaga, but the reservation was under Toll’s name.³ Id. This information was confirmed, and
12 the security officers left. Id. As they left, they received word that Toll was actively gaming on
13 the slot floor, so Day and Vicenti went to confront him, calling for additional security officers as
14 they walked. Id. Day informed Toll that he was with The Cosmopolitan security and requested
15 that Toll accompany him to a security interview room. Id. Toll initially complied but changed his
16 mind when they approached the doors exiting the casino floor and entering the security hallway.
17 Id. Toll stated he would not be “going into a back room or anything.” Id. Day asked Toll about
18 the Player Cards in his room and Toll stated that he collects the cards, which belonged to himself
19 or his friends. Id. Toll also indicated that Kirschbaum was his wife, the Visa card in her name
20 was linked to an empty account, and they were going through a divorce. Id. Toll then told Day he
21 would return to his room, pack his belongings, and leave the premises. Id.

22 While Toll packed, Day contacted Las Vegas Metropolitan Police Department (“Metro”)
23 regarding Toll’s possession of the Visa card in someone else’s name. (ECF #15-10, at 3). Metro
24 indicated it would respond. Id. After Toll packed, Day and Vicenti escorted him to the security
25 interview room around 6:00 p.m. Id. According to Day, Toll went willingly and unrestrained. Id.
26 Day frisked Toll upon entering the security room and found that Toll did not have any weapons
27

28 ³ After Toll was evicted, Day informed the occupants of Toll’s other rooms that they would have to leave
also. They did without incident. (ECF #15-10, at 2–4).

1 or controlled substances on him. Id. Day then read Toll the trespass warning, permanently
 2 trespassing him from The Cosmopolitan of Las Vegas. Id. Toll asked if he could use the
 3 restroom and Day and Vicenti accompanied him to the restroom on the casino floor. Id. They
 4 returned to the security room and waited for Metro to arrive. Id. Metro arrived around 7:37 p.m.
 5 and began its investigation. Id. At or around 7:57, Metro officers indicated they would keep the
 6 Visa card in Kirschbaum's name but not take any further action upon Toll. Id. Toll was then
 7 escorted to valet where he retrieved his car and left the premises. Id. Because Toll had been
 8 permanently trespassed, he was not permitted to participate in the Promotion. (ECF #15, at 5).

9 Toll brought this action on May 25, 2020. (ECF #1). The Cosmopolitan sent Toll its First
 10 Set of Requests for Admission on February 19, 2021. (ECF #16, at 4). Toll did not respond.
 11 Discovery is complete and the parties seek summary judgment.

12 II. Legal Standard

13 Summary judgment may be granted if the pleadings, depositions, answers to
 14 interrogatories, and admissions on file, together with affidavits, if any, show that there is no
 15 genuine issue as to any material fact and that the moving party is entitled to a judgment as a
 16 matter of law. See FED. R. CIV. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322
 17 (1986). The moving party bears the initial burden of showing the absence of a genuine issue of
 18 material fact. See Celotex, 477 U.S. at 323. The burden then shifts to the nonmoving party to set
 19 forth specific facts demonstrating a genuine factual issue for trial. See Matsushita Elec. Indus.
 20 Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

21 All justifiable inferences must be viewed in the light most favorable to the nonmoving
 22 party. See Matsushita, 475 U.S. at 587. However, the nonmoving party may not rest upon the
 23 mere allegations or denials of his or her pleadings, but he or she must produce specific facts, by
 24 affidavit or other evidentiary materials as provided by Rule 56(e), showing there is a genuine
 25 issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). "Where evidence
 26 is genuinely disputed on a particular issue—such as by conflicting testimony—that 'issue is
 27 inappropriate for resolution on summary judgment.'" Zetwick v. Cnty. of Yolo, 850 F.3d 436,
 28 441 (9th Cir. 2017) (quoting Direct Techs., LLC v. Elec. Arts, Inc., 836 F.3d 1059, 1067 (9th

1 Cir. 2016)). “Credibility determinations, the weighing of the evidence, and the drawing of
 2 legitimate inferences from the facts are jury functions, not those of a judge.” Anderson, 477 U.S.
 3 at 255.

4 III. Analysis

5 Both Toll and The Cosmopolitan submitted motions for summary judgment. Toll moves
 6 for partial summary judgment, asking the Court to enter summary judgment in his favor as to
 7 liability on his false imprisonment, battery, and unjust enrichment claims. Toll submits his other
 8 claim and the issue of damages should be reserved for a jury. The Cosmopolitan asks the Court
 9 to grant summary judgment in its favor on all claims.

10 a. Battery

11 Toll’s battery claim arises from his time spent in the security room awaiting Metro. Upon
 12 entering the room, Day frisked Toll to check for weapons or drugs. Toll does not argue that he
 13 was physically hurt by the frisking, but that it was a battery nonetheless and a jury should be
 14 tasked with determining appropriate damages. The Cosmopolitan argues that Toll consented to
 15 the frisking because when Day indicated he was going to frisk him, Toll did not object. The
 16 Cosmopolitan also argues that its security officer only intended to search for weapons, not to
 17 harm or offend Toll.

18 A battery is “an intentional and offensive touching of a person who has not consented to
 19 the touching.” Humboldt Gen. Hosp. v. Sixth Jud. Dist. Ct., 376 P.3d 167, 171 (Nev. 2016).
 20 Consent negates the existence of a battery and denies liability. Prell Hotel Corp. v. Antonacci,
 21 469 P.2d 399, 401 (Nev. 1970). To be effective, “consent must be (a) by one who has the
 22 capacity to consent . . . and (b) to the particular conduct, or to substantially the same conduct.”
 23 Davies v. Butler, 602 P.2d 605, 612 (Nev. 1979) (quoting RESTATEMENT (SECOND) TORTS
 24 § 892A). Consent can be either express or implied “and implied consent may be manifested
 25 when a person takes no action, indicating an apparent willingness for the conduct to occur.”
 26 Barnes v. Am. Tobacco Co., 161 F.3d 127, 148 (3d Cir. 1998) (citing RESTATEMENT (SECOND)
 27 TORTS § 892 cmt. b & c).

28 Toll’s failure to respond to The Cosmopolitan’s requests for admission requires the Court

1 to accept the requests as admitted. FED. R. CIV. P. 36(a)(3) (“A matter is admitted unless, within
 2 30 days after being served, the party to whom the request is directed serves on the requesting
 3 party a written answer or objection.”). As such, Toll admitted that he was informed that he would
 4 be frisked, and he did not object or react. This constitutes his implied consent to be frisked. A
 5 reasonable person in this situation would understand Toll’s inaction as consent to be searched by
 6 The Cosmopolitan’s security guards, especially as they were waiting for Metro to arrive and
 7 making sure the scene was safe. The existence of his consent negates the battery and the Court
 8 grants summary judgment to The Cosmopolitan.

9 b. Unjust Enrichment

10 An unjust enrichment claim requires “(1) a benefit conferred on the defendant by the
 11 plaintiff; (2) appreciation by the defendant of such benefit; and (3) an acceptance and retention
 12 by the defendant of such benefit under circumstances such that it would be inequitable for him to
 13 retain the benefit without payment of the value thereof.” Takiguchi v. MRI Int’l, Inc., 47
 14 F.Supp.3d. 1100, 1119 (D. Nev. 2014). “Unjust enrichment occurs whenever a person has and
 15 retains a benefit which in equity and good conscience belongs to another.” Id. Toll argues that
 16 The Cosmopolitan received a benefit from Toll in the form of Toll’s gambling losses, that The
 17 Cosmopolitan appreciated that benefit because its host encouraged Toll to continue gambling,
 18 and that The Cosmopolitan retained the benefit and has refused to reimburse Toll for his losses.
 19 Toll argues that his case is unique and that he does not intend to create an unjust enrichment
 20 claim for all gamblers who lose money in Las Vegas. Instead, Toll argues that, as a professional
 21 gambler, his losses were a business investment for participation in the Promotion, which The
 22 Cosmopolitan intended to keep without offering Toll access to the Promotion. The Cosmopolitan
 23 argues that this is not the correct format in which to seek recovery of gambling losses. According
 24 to The Cosmopolitan, Nevada statutes set forth an administrative process to recover gaming
 25 losses, so Toll must seek his remedy with the Nevada Gaming Control Board (“NGCB”).

26 First, the Court is not convinced by The Cosmopolitan’s argument that Toll must seek
 27 relief from the NGCB. The same case that The Cosmopolitan cites to support its proposition that
 28 Toll must seek relief from the NGCB states that “a party may assert an action outside the

1 administrative process to recover gambling losses sustained due to casino fraud.” Erickson v.
2 Desert Palace, Inc., 942 F.2d 694, 697 (9th Cir. 1991). Toll’s allegation is that The Cosmopolitan
3 fraudulently collected his losses without intent to permit Toll’s participation in the Promotion.
4 This falls under the exception laid out in Erickson. Additionally, if The Cosmopolitan believed
5 that recovery was subject to the administrative process of NRS § 463.361, it would have had a
6 duty to report the dispute to the NGCB. NEV. REV. STAT § 463.362 (stating that whenever a
7 dispute which cannot be resolved involving the manner in which a promotion is conducted
8 involves “[a]t least \$500, the licensee shall immediately notify the Board.”). There is no
9 indication in the record that The Cosmopolitan notified the NGCB of the dispute, suggesting that
10 it does not truly consider the administrative process to be Toll’s only potential source of remedy.

11 Second, while The Court does not find that Toll is limited to administrative relief, it fails
12 to see unjust enrichment in this case. The Cosmopolitan received and retained a benefit in the
13 form of Toll’s gambling losses. However, Toll cannot show that his gambling losses do not
14 belong to The Cosmopolitan “in equity and good conscience.” Takiguchi, 47 F.Supp.3d. at 1119.
15 There is no evidence that Toll was the victim of the bait-and-switch scheme he alleges; one
16 designed to entice him to lose hundreds of thousands of dollars gambling to then prevent him
17 from participating in the Promotion and keep the profits. It was Toll’s behavior that led to his
18 trespass and Toll, as a professional gambler, was aware of the risks of his strategy. He lost nearly
19 a quarter of one million dollars for the chance to participate in the Promotion and maybe earn a
20 profit, knowing full well that it was not guaranteed. (ECF #21-4, at 22 (Toll describing his
21 expected odds to win, stating he “would basically have a 66 percent of cashing and you would
22 have that four times. So you’d have a two-third chance and a two-third chance and a two-third
23 chance which mathematically makes your odds astoundingly in your favor” but acknowledging
24 that “it’s not a hundred percent odds.”)). He knew the risks of gambling and received the benefit
25 of participating in the games. Because Toll cannot show evidence of his bait-and-switch scheme
26 theory or show that his gambling losses belong in equity and good conscience to someone other
27 than The Cosmopolitan, his unjust enrichment claim cannot prevail.

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1 c. Consumer Fraud

2 The complaint alleges that The Cosmopolitan made a false representation, in
 3 “contravention of Section 598.0915(15) of the Nevada Revised Statutes” when it indicated that if
 4 Toll “earned the requisite number of player points, he would be permitted to partake in the
 5 Million Point Club III Promotion.” (ECF #1, at 7). Toll’s argument appears to be that The
 6 Cosmopolitan never intended to permit his participation in the Promotion and instead
 7 fraudulently encouraged him to gamble, only to pull the rug out from beneath him at the final
 8 hour. The Nevada Deceptive Trade Practices Act (“NDTPA”) states that “[a] person engages in a
 9 ‘deceptive trade practice’ if, in the course of his or her business or occupation, he or she
 10 knowingly makes any other false representation in a transaction.” NEV. REV. STAT.
 11 § 598.0915(15). The Cosmopolitan argues that Toll has not provided any evidence that would
 12 support his argument. Toll’s response did not address this argument and focused instead on
 13 explaining the impact of his failure to respond to the requests for admission and why an expert
 14 was not required.

15 The Court agrees with The Cosmopolitan that Toll has not provided evidence to satisfy
 16 the elements of his fraud claim. To prevail on a private NDTPA claim, “a victim of consumer
 17 fraud [must] prove that (1) an act of consumer fraud by the defendant (2) caused (3) damage to
 18 the plaintiff.” Picus v. Wal-Mart Stores, Inc. 256 F.R.D. 651, 658 (D. Nev. 2009). Toll has
 19 provided no evidence that The Cosmopolitan made any false representations regarding the
 20 Promotion. There is no evidence of Toll’s bait-and-switch theory or that The Cosmopolitan
 21 committed an act of consumer fraud. Without such evidence, Toll’s consumer fraud claim fails.

22 d. False Imprisonment

23 Toll urges the Court to grant partial summary judgment on his false imprisonment claim
 24 as “it is difficult to muster a fact pattern more directly consistent” with false imprisonment than
 25 this. (ECF #15, at 7–8). To prevail on a false imprisonment claim, a plaintiff must show that “(1)
 26 defendant acted intending to confine plaintiff within boundaries fixed by defendant; (2)
 27 defendant’s acts directly resulted in such a confinement; and (3) plaintiff is conscious of the
 28 confinement or was harmed by it.” Lopez v. Golden Nugget Casino, No. 2:17-cv-01712-RFB-

1 VCF, 2017 WL 3219693, at *5 (D. Nev. July 28, 2017). False imprisonment also requires that
 2 “the plaintiff was restrained of his or her liberty under probable imminence of force without any
 3 legal cause or justification.” Garton v. City of Reno, 720 P.2d. 1227, 1228 (Nev. 1986). Toll
 4 argues that there is no more obvious an instance of false imprisonment than this, as he was held
 5 in The Cosmopolitan security room until Metro arrived, and Toll was aware of the confinement
 6 the whole time. The Cosmopolitan argues that Toll consented to waiting in the security room and
 7 that, because Toll has not procured an expert witness to testify regarding The Cosmopolitan’s
 8 standard of care, Toll cannot establish the elements of a false imprisonment claim.

9 Nevada statute grants immunity to casinos when they detain an individual who is
 10 believed to have committed a felony. NEV. REV. STAT. § 171.1235. The Cosmopolitan mentioned
 11 but did not analyze this statute in its reply brief. The statute authorizes casinos to detain
 12 individuals when they “have reasonable cause to believe the person detained has committed a
 13 felony, whether or not in the presence of such licensee or the licensee’s officers, employers or
 14 agents.” Id. at § 171.1235(2). The detention must only be for a reasonable amount of time, in a
 15 reasonable manner, and “solely for the purpose of notifying a peace officer.” Id. at
 16 § 171.1235(3). “Such taking into custody and detention shall not render the licensee or the
 17 licensee’s officers, employees or agents criminally or civilly liable for . . . false imprisonment.”
 18 Id. Casinos are only entitled to this immunity if “there is displayed in a conspicuous place in the
 19 establishment a notice in boldface type clearly legible” and following the form provided in the
 20 statute. Id. at § 171.1235(4). Whether The Cosmopolitan is entitled to this immunity depends on
 21 whether it has complied with the notice requirement. Because the record is silent on this issue,
 22 there exists a question of material fact, making summary judgment on the false imprisonment
 23 issue improper. The Cosmopolitan’s expert stated in his report that “Cosmopolitan’s overall
 24 actions as it relates to Plaintiff were reasonable, appropriate and well within the common
 25 practices and the standard of care for similar casinos in Clark County, Nevada.” (ECF #17, at 7).
 26 He also states that The Cosmopolitan is immune from liability under NRS § 171.1235 but does
 27 not mention the required notice and whether it was posted. Now, whether the immunity applies
 28 to The Cosmopolitan is a question of fact which precludes summary judgment.

1 Even without such immunity, it is possible Toll may not prevail on his false
2 imprisonment claim. He will have to convince a jury that his lay testimony that there was no
3 reason to trespass him and no legal cause or justification for his detention is more believable than
4 The Cosmopolitan's expert and video evidence. The Court is confident that the issues are not
5 "beyond the comprehension of the ordinary lay person." Layton v. Yankee Caithness Joint
6 Venture, L.P., 774 F.Supp. 576, 580 (D. Nev. 1991). The Court will not require Toll to use
7 expert testimony, but it will be difficult to rebut The Cosmopolitan's expert without one.
8 Therefore, the Court does not grant summary judgment on this claim. However, if The
9 Cosmopolitan can provide evidence that statutory immunity applies to it, it may renew its motion
10 for summary judgment.

11 IV. Conclusion

12 Accordingly, IT IS HEREBY ORDERED that Defendant's Motion for Summary
13 Judgment (ECF #16) is **GRANTED IN PART**.

14 IT IS FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment
15 (ECF #15) is **DENIED**.

16 Dated this 9th day of December, 2021.

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19 Kent J. Dawson
20 United States District Judge
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